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In the Supreme Court of the United States

OCTOBER TERM, 1974

JOSEPH NOCAR and JOHN PENDERGAST,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Joseph Nocar and John Pendergast, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 31, 1974, affirming petitioners' conviction and the petition of the petitioners for rehearing and suggestion for rehearing en banc before the United States Court of Appeals for the Seventh Circuit denied on July 18, 1974.

OPINION BELOW

The opinion of the Court of Appeals, appears in the Appendix hereto, p. 1.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1974 and a timely petition for rehearing and suggestion for rehearing en banc filed on June 14, 1974 was denied on July 18, 1974. The jurisdiction of this court is envoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the failure of the Attorney General to update and republish schedules of controlled substances as required by 21 U.S.C. 812 (a) prohibits the petitioners' federal prosecution under 21 U.S.C. 841 (a) (1) for the unauthorized use of marijuana since there was no valid prohibition in force at the time of the alleged occurrence on January 8, 1972.

2. Whether probable cause existed for the warrantless search of a motor vehicle by government agents in this cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. 963
21 U.S.C. 952 (a)
21 U.S.C. 812
21 U.S.C. 812 (a)
21 U.S.C. 841 (a)
36 Fed.Reg. 7776, at 7802
37 Fed.Reg. 9545
21 U.S.C. 811
44 U.S.C. 1501-1511
44 U.S.C. 1507
44 U.S.C. 1503
18 U.S.C. 2516 (1)
Fourth Amendment to United States Constitution
28 C.F.R. 0:100, 1972

STATEMENT OF THE CASE

Petitioners were indicted in the United States District Court for the Northern District of Illinois, Eastern Division, in a one count indictment and charged with knowingly and intentionally possessing a quantity of marijuana with intent to distribute same on or about January 8, 1972, in violation of Title 21, U.S.C. 841 (a) (1) (Comprehensive Drug Abuse Prevention and Control Act).

The Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted in October, 1970. Under the 1970 Act, the Attorney General was directed regularly to update and republish lists designating which drugs were subject to control, including control by criminal sanction. He has since subdelegated all of his duties under the Act to the Director of the Bureau of Narcotics and Dangerous Drugs. 28 C.F.R. 0:100, 1972. Included in the subdelegation was the basic legislative responsibility to proscribe what substances shall be controlled. The statute became effective on October 27, 1970. (See Historical Note in 21 U.S.C.A. 812 at p. 28). Under 21 U.S.C. 812, the schedules of controlled substances initially consisted of the lists published in the statute as originally promulgated. The statute establishes five schedules of controlled substances. 21 U.S.C. 812 (a). "Such schedules shall initially consist of the substances listed in this section". The statute goes on as follows:

> "The schedules established by this section shall be updated and republished on a semi-annual[1] basis during the two year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

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[1] Semi-annual means twice a year or every six months. Webster's Seventh New Collegiate Dictionary 787 (1972).

The complete history of the pertinent republications pursuant to the statutory scheme is as follows:

There was a full republication on April 20, 1971, effective May 1, 1971 (36 Fed.Reg. 7776, at 7802) (six months before the date required by law) and again on May 12, 1972, nunc pro tunc April 27, 1972 (37 Fed.Reg. 9545).

However, there was no full republication, nor any republication at all, in October, 1971, as required by law. 21 U.S.C. 812 (a).

Petitioner then filed a motion to dismiss the indictment due to the failure of the Attorney General to update and republish schedules of controlled substances as required by 21 U.S.C. 812 (a) which motion was denied and allowed to stand as petitioners' post trial motion.

At the hearing on the defendants' Motion to Suppress, custom's agent Robert J. Smith testified that he had received a telephone call from a reliable informant, informing him that there were two men and a woman driving a blue Toyota automobile with Texas license JXP 530, in Chicago, attempting to locate buyers for narcotics and that they were staying in a Motel at Sheridan and Foster. The telephone call was received January 7, 1972, at 12:00 noon. Agent Smith then testified that he proceeded to the motel at that location and verified that there was a vehicle of that description and license number at the motel. Surveillance was then established of the car and the room that the individuals were registered in with that automobile. Agent Smith then testified that two men and a woman (one of the men being defendant, Nocar) were in Room 232 at the Motel and the drapes on the room were drawn wide open and it was very easy to see the people in the room. Agent Smith then checked the registration of the blue Toyota motor

vehicle and was told that the license plates were registered to one, M. A. Guerra, in Rio Gandy City. Agent Smith then stated that the agent obtaining the information concerning the license plates also checked files and found that Carol Guerra, daughter of M. A. Guerra, was under indictment and that an agent in Falcon Heights, Texas had stated that the automobile had been in Mexico and had crossed back into the United States on December 26th. Agent Smith then testified that a Thunderbird automobile driven by John Pendergast came to the Motel and Pendergast had a conversation with the other persons in the motel room and that surveillance was maintained while they were having this conversation.

Agent Smith then stated that he maintained surveillance on January 7, 1972, and followed the four parties (two in each vehicle) as they went to the rear of 1203-5 N. State, Chicago, and backed the Toyota into a garage at that address. Agent Smith testified that the blue Toyota left the garage behind 1203-5 N. State Street, after a fairly short amount of time. Agent Smith then followed the Toyota back to the Travel Lodge Motel and an application for a search warrant was thereafter made to the United States District Court on January 7, 1972, for the garage behind 1203-5 N. State Street. The garage was searched at 6:00 oclock that evening and nothing contraband was found.

The following day, January 8, 1972, surveillance was being made by several government agents of the area near State and Division Streets (1200 North). Agents Smith and Thomas Allen King were in an automobile parked on the west side of State Street in the 1200 block, facing south, at approximately 1:50 P.M. Defendants, Pender-

gast and Nocar, were walking towards Division Street. Agent Smith then parked his vehicle to the south of the garage in the alley. (It was stated that the southern exit to the alley, which was Division Street, was a couple of hundred feet south of the garage.)

Agent Smith stopped his car at the southern end of the alley. Agent King left the car and walked north in the alley. Agent King then walked north in the alley past the vehicle to a point about 10 to 15 yards north of the garage in the alley. The Toyota vehicle was backed into the garage. Agent Smith was waiting in his vehicle at the south end of the alley until signalled by Agent King (after Agent King had walked past the garage and turned and faced south to signal Agent Smith).

At this time (approximately 1:50 P.M. on January 8, 1972) there were approximately seven or eight agents in the vicinity of the 1200 block of State Street, in communication by two way radio. This was a mile or a mile and a half from the Federal Building.

Agent King stated that he, while walking north in the alley, observed the Toyota automobile partially backed into the garage. The door of the garage was partially closed and flush to the trunk lid of the vehicle which was open. The trunk of the vehicle was in the rear. A rug was draped over the opening between the trunk lid and the body of the automobile, the right rear fender of the automobile. Agent King testified that he observed defendant Nocar, removing what appeared to be white bags from the trunk of the automobile and handing them to Mr. Pendergast. Agent King said he observed Mr. Pendergast take the bags from Mr. Nocar and move them to some area farther back in the garage where he could not

see them. All of his observations were made as he walked at a normal pace without slowing down past the opening of the garage. He did not slow down and the full time he could observe anything was 10 to 15 seconds as he walked by.

Agent King, after walking past the garage, then signalled Agent Smith. Agent Smith drove north in the alley and stopped his car and alighted therefrom a short distance south of the entrance to the garage. Agent King, approaching on foot from the north of the garage, and Agent Smith, approaching on foot from the south of the garage, came to the entrance of the garage almost simultaneously. The entrance to the garage was somewhere between eight feet wide and ten or twelve feet wide.

When the agents came to the door of the garage, the trunk of the car was closed.

It was never contended, by the Government that Agent King could ascertain, or see, the contents of the white sacks he claimed to have seen. Agent King further stated that he could not determine what was inside of the bags as he was walking past the garage and couldn't tell what type of bags they were.

Agent Smith admitted that he couldn't see inside of the trunk of the automobile at the time he exited from his automobile, and stated that the trunk was closed when he got to the opening of the garage and looked into the garage.

Agents Smith and King entered the garage simultaneously, and Agent King admittedly had his gun drawn.

Agent Smith ordered defendant, Nocar, to open the trunk of the Toyota vehicle. After the trunk of the vehicle had been opened, Agent Smith stated that he then placed the defendants under arrest.

No attempt was made to obtain a search warrant for the motor vehicle on January 8, 1972. Agent King testified that he knew that he could go and obtain a search warrant from a Magistrate (wherever the Magistrate might be) even though it was his understanding that the Magistrate's office closed at noon on Saturdays. (T. 1/29/73, P. 70).

The Lower Court, after hearing, denied the defendants' Motion to Suppress the Evidence obtained from the search of the Toyota motor vehicle.

The denial of the Motion to Suppress by the Lower Court was based upon the finding by the Lower Court that the agents had probable cause to believe that the Toyota automobile contained contraband drugs.

The petitioners waived a jury trial and stipulated that the testimony of the government witnesses which was adduced at the hearing on the motion to suppress would be identical to their testimony on trial and the court, on the basis of the stipulated testimony, entered a judgment of guilty against both petitioners. On June 22, 1973, the court denied the post trial motion to dismiss the indictment of the defendants and sentenced the petitioner Nocar for three years followed by a special three year parole term and the petitioner Pendergast for six months to be followed by a period of probation of four years.

Petitioners appealed from the judgment of conviction and sentence. The court of Appeals for the Seventh Circuit affirmed in an opinion dated May 31, 1974 and denied the petitioners' motion for rehearing and suggestion for rehearing en banc on July 18, 1974.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW UNDULY EXTENDS THE REACH OF 21 U.S.C. 812 (a) AND CONFLICTS WITH THE CONGRESSIONAL INTENT AND THE RULE THAT CRIMINAL STATUTES ARE TO BE STRICTLY CONSTRUED.

Defendants were convicted of knowingly and intentionally possessing with intent to distribute approximately 18,772 grams of marijuana, a Schedule I narcotic drug controlled substance, in violation of Title 21, U.S.C., Section 841 (a) (1). The gist of the offense is that the substance which they allegedly knowingly and intentionally possessed with intent to distribute was a controlled substance.

Due to the failure of the Attorney General to comply with the statutory requirements concerning republication of lists of controlled substances, marijuana cannot properly be characterized as a controlled substance at the time of the alleged offense in the indictment, to-wit: January 8, 1972. (A. 1) Therefore, no offense was or could have been committed as alleged, and the convictions should be reversed.

Under 21 U.S.C. 812, the schedules of controlled substances initially consisted of the lists published in the statute as originally promulgated. The statute became effective on October 27, 1970. (See Historical Note in 21 U.S.C.A. 812, at p. 28). The statute establishes five schedules of controlled substances. 21 U.S.C. 812(a). "Such schedules shall *initially* consist of the substances listed in

this section". (Ibid., emphasis added.) The statute goes on as follows:

> "The schedules established by this section *shall be updated and republished* on a semi-annual[2] basis during the two year period beginning one year after the date of enactment of this subchapter and *shall be updated and republished* on an annual basis thereafter." (Emphasis added)[3]

Thus, under the terms of the statute, the schedules created therein as listed were only valid for one year from its effective date; that is, for one year from October 27, 1970; that is, until October 27, 1971.

The complete history of the pertinent republications pursuant to the statutory scheme is as follows:

There was a full republication on April 20, 1971, effective May 1, 1971 (36 Fed. Reg. 7776, at 7802) (six months before the date required by law) and again on May 12, 1972, nunc pro tunc April 27, 1972 (37 Fed. Reg. 9545).

However, there was no full republication, *nor any republication at all,* in October 1971, as required by law. 21 U.S.C. 812 (a).

Therefore, from October 1971 (when a full republication should have taken place, but did not) and May of 1972 (when full republication was made) marijuana was not a controlled substance, because there were no valid schedules

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[2] Semi-annual means twice a year or every six months. Webster's Seventh New Collegiate Dictionary 787 (1972).

[3] The subsequent schedules are to be promulgated by the Attorney General, see 21 U.S.C. 811, who obviously also is responsible for the required republications.

due to lack of republication as required during that interim. Thus, any criminal charge alleging a marijuana offense between those dates must fall.

In the case at bar, the time of the alleged offense, (January 8, 1972), falls within that interim period during which there were no valid schedules of controlled substances.

The mandate of publication is not a mere technical requirement. Those subject to prosecution for violation of law are constitutionally entitled to know what conduct the law forbids. Indeed, this is a clear requirement of due process of law. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453, 83 L.Ed. 888, 890 (1939); *Bouie* v. *City of Columbia,* 378 U.S. 347, 350-51, 12 L.Ed. 2d 894, 898 (1939).

Where, as here, republication of revised schedules is required by the terms of the statute itself, such republication is to be accomplished by printing in the Federal Register. See Federal Register Act 44 U.S.C. 1501 through 1511. Specifically, Sec. 1505 (a), provides in pertinent part:

> "There shall be published in the Federal Register—
> . . .
> (3) documents or classes of documents that may be required to be published by Act of Congress."

21 U.S.C. 812 (a) undisputedly is an Act of Congress requiring publication of documents, to-wit, schedules of controlled substances.

Moreover, 44 U.S.C. 1507 provides that no document required to be published in the Federal Register shall be valid as against any person not having actual knowledge thereof until copies have been filed with the Office of the Federal Register and made available for public inspection pursuant to 44 U.S.C. 1503. The logical import of this

is that failure to publish a document required to be published renders it invalid; for without publication of a document required to be published, there is no notice, either actual or constructive.

This principle has been judicially recognized. In *Borak* v. *Biddle,* 141 F.2d 278 (D.C. Cir. 1944), the court held that a purported Civil Service Commission regulation which had never been published in the Federal Register as required by law could not be held effective as against a person with no actual knowledge thereof. Id. at 280. And in *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954), the court reversed the conviction of defendant, a commercial fisherman, for having fished in certain waters, because a regulation purporting to extend the time of the prohibition was not published in the Federal Register, *as required by law.*[4]

The *Hotch* case is persuasive authority in support of defendants' position, inasmuch as there, as here, defendant's conviction depended on the validity of a purported extension of an existing regulatory scheme; and there, as here, failure to publish such extension rendered it invalid. Hence, in the case at bar, once the schedules lapsed by the terms of the statute which created them because of failure of the Attorney General to cause updated schedules to be published at the times required by law, there were no valid schedules during that interim period as set forth above.

Thus, by the terms of the Federal Register Act, and of the Drug Abuse Prevention and Control Act, by pertinent case law, and by the requirements of due process of law, defendants' convictions were based on non-existent provisions and should be reversed.

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[4] This holding was reached regardless of whether defendant had actual notice of the extension. 212 F.2d at 284.

There is a further reason related to the republication requirement which invalidates the convictions. Publication is to be by the Attorney General. See 21 U.S.C. 811. However, one John E. Ingersoll, Director of the Bureau of Narcotics Drugs, caused the inapplicable republication of May 8, 1972, 37 Fed.Reg. 9545 (and the previous republication as well). Thus, even if the republication were timely, as it was not, it would have been invalid, since it was caused to be made by one not authorized so to do.

Where a statute authorizes or requires a particular individual to perform an act, only that individual has power to perform it.

See, e.g., the numerous wiretap cases held invalid because the authorization of the Attorney General under 18 U.S.C. 2516 (1) was improperly delegated in a manner not authorized by the Congress. *United States* v. *Robinson*, 468 F.2d 189 (5 Cir. 1972); *United States* v. *Giordano*, 469 F.2d 522 (4 Cir. 1972).

In *United States* v. *Giordano*, 15 CRL 3033, decided May 13, 1974, the Supreme Court held:

> "We conclude that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specifically designated by him and the primary or derivative evidence secured by wire interception pursuant to a court order issued in response to an application which was, in fact, not authorized by one of the statutorial designated officials must be suppressed. . . ."

The United States Court of Appeals for the Seventh Circuit has decided an important question of federal law, which to the knowledge of the petitioner has not been, but should be settled by this Court because of its effect on the

validity of 21 U.S.C. 812 (a) during the period of time from October 28, 1971 to May 11, 1972, since during that period there was no valid prohibition in force due to the failure of the Attorney General and the Bureau of Narcotics and Dangerous Drugs to update and republish the schedules of controlled substances as required by law.

II.

THE DECISION OF THE LOWER COURTS UNDULY EXTENDS THE THEORY OF EXISTENCE OF PROBABLE CAUSE AND REASONABLE SEARCH AND SEIZURE.

It was the contention of the Defendants that the search and seizure in this cause was in violation of the Defendants' Fourth Amendment rights. The search was conducted without color of warrant, without the voluntary consent of the Defendants and without the existence of any exigent circumstances so as to justify a warrantless search of the motor vehicle in this cause.

The lower courts found that there was probable cause to conduct a warrantless search of the motor vehicle in this cause where the search was initially based on an unknown informant's assertion that certain named persons (neither of the Defendants) were attempting to sell narcotics. This information was characterized as being superior to casual rumor but the Defendants' contention was that the informant's assertion and the subsequent observations of the agents (which the court found to be corroborative) was still not sufficient to constitute probable cause for the search of the automobile.

The lower courts found that the observations of Agent King and the slamming of the trunk lid were the least needed corroboration of the informer's tip to create prob-

able cause. The courts found that the agents in this cause had many more facts on which to rely than had the agents in *Henry* v. *United States,* 361 U.S. 98 (1969). Their ruling was that in this cause, the agents' observations of white bags which are often used to transport marijuana, and the apparent covert garage activities of the Defendants were deemed to be sufficient corroboration of an informant's tip that someone was attempting to sell narcotics. The Defendants argue that these facts are identical to the facts in *Henry* v. *United States,* where Defendants were observed in apparently covert activities in an alley with large boxes (which could have been used to transport goods stolen in Interstate shipment) and the court found that these activities were not sufficient to corroborate an informant's tip that the parties had participated in an Interstate theft of merchandise.

The lower courts repeatedly stated that it was practicable for the agents to try to obtain a search warrant before conducting the search, and stated that the magistrate is present on Saturdays at the Federal building only until noon. The lower courts completely overlook and ignore the fact that the agents made no attempt to ascertain whether a magistrate was possibly present in the Federal building and made no attempt to ascertain how long the warrant procedures would have taken. The Government's contention that Carol Guerra, or the unidentified male could have possibly attempted to remove the Toyota automobile is not a situation which was similar to *United States* v. *Menke,* 468 F.2d 20, which had been relied on by the Government. In the *Menke* case, the parties who might have access to the automobile were in no way connected to the contraband which the Government agents believed to be in

the automobile. Also, in the instant case, the number of agents present at the scene and the short distance to the Federal Building to obtain a warrant would have certainly allowed the federal agents to present a petition for warrant without jeopardizing loss of contraband.

The failure of the Government agents to seek a warrant so that the conclusion as to probable cause for a search would have been that of an experienced federal magistrate or judge certainly was violative of the Defendants' Fourth Amendment rights. Since the agents failed to submit the factual situation to an independent magistrate, the factual situation and the apparent discrepancies therein between the Government's version and the Defendants' version of the facts surrounding the arrest should have been more closely scrutinized by the court. It is the contention of the Defendants that a thorough review of all of the facts and law in the case at bar should have led the lower courts to the inescapable conclusion that the motions of the Defendants, Nocar and Pendergast, to suppress the evidence in this cause should have been granted.

CONCLUSION

For the reasons urged herein, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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